

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,

Case Nos. 09-CR-0054 (PJS/FLN),
12-CV-1214 (PJS)

Plaintiff,

v.

ORDER

NICOLAS ROSAS-GUTIERREZ,

Defendant.

Defendant Nicolas Rosas-Gutierrez filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. That motion was denied on April 4, 2013, and judgment was entered the following day. Rosas, acting pro se, filed a notice of appeal on August 1, 2013. ECF No. 107. The Eighth Circuit construed that notice of appeal as a motion to reopen the time to file an appeal pursuant to Rule 4(a)(6) of the Federal Rules of Appellate Procedure and referred that motion to the Court for a ruling.

Having now considered Rosas's motion and the government's response to that motion, the Court finds that each of the three conditions set forth in Rule 4(a)(6) is met:¹

First, at the time that he filed his appeal, Rosas alleged that he had not received a copy of the judgment; indeed, Rosas alleged that he did not even know that a judgment had been entered against him until late July, when, at his request, the Clerk of Court mailed a copy of the docket to him. For its part, the government says that it "cannot state with any level of confidence" that

¹In opposing Rosas's motion, the government argues only that Rosas's appeal will be futile because his § 2255 motion was properly denied by the Court. But, under Rule 4(a)(6), the merits of the appeal are not relevant in deciding whether the time to appeal should be reopened.

Rosas's allegation is untrue. ECF No. 113 at 3 n.1. Accordingly, the Court finds that Rosas did not receive notice of the judgment within 21 days after it was entered.

Second, Rosas's motion to reopen the time to file an appeal was filed less than 180 days after the judgment was entered. (As noted, Rosas had not received notice of the judgment as of the time that he filed his appeal.)

Third, the Court finds that neither party would be prejudiced by reopening the time for Rosas to file his appeal.

For these reasons, Rosas's motion is granted. The Court notes, however, that in its April 4, 2013 order, it declined to issue a certificate of appealability.

ORDER

Based on the foregoing, and on all of the files, records, and proceedings herein, IT IS HEREBY ORDERED THAT the motion of defendant Nicolas Rosas-Gutierrez to reopen the time to file an appeal [ECF No. 107] is GRANTED.

Dated: September 10, 2013

s/Patrick J. Schiltz
Patrick J. Schiltz
United States District Judge